MOHD. ROBAEI HJ. MD. SOM & ORS.

v.

DAMANHURI HJ. HASHIM & ANOR.

HIGH COURT MALAYA, SHAH ALAM
WAN YAHYA J
[ORIGINATING MOTION NO. 25-1 OF 1990]
27 MARCH 1990

CIVIL PROCEDURE: *Extension of time to file and serve notice of appeal - Special leave - Special circumstances.*

At the date on which judgment was to be delivered at the Sessions Court, the respondent sent his pupil P to Court; P also mentioned on behalf of the applicant M's Counsel. P recorded the oral judgment and supplied a handwritten copy to the applicant's clerk C who then conveyed the judgment to M's Counsel.

M sent a draft judgment to R; after amendments R returned it to M. As a result of the contrary views taken by the parties as to the correct terms of the verbal judgment, M sought a settlement of the order by the Sessions Judge; before the matter was heard R advised M by letter that the Sessions Court Judge was *functus officio* and that R would not attend the meeting fixed by the Sessions Court Judge. At the said date only M attended the meeting and the order was settled in R's favour.

M appeals on the basis of an important point of law (which was not argued during the hearing of the application); R's only objection was that special leave should be refused as the main issue arising out of the application had originated from M's Counsel's mistake in misappreciating the Sessions Courts Judge's judgment. M then applied for an extension of time to file and serve a notice of appeal.

Held:

[1] The term "special leave" in an application for extension of time to file a notice of appeal means leave to be granted on account of special circumstances.

[2] On the facts of this case, there were special circumstances which support M's application for extension of time and as this appeal involved an important question of law, appeal is allowed.

[Appeal allowed.]

Cases referred to:

Chong Kueng Ying & Other v. Louis Lavagna [1972] 1 MLJ 180
Chin Hua Sawmill Co. Sdn. Bhd. v. Tuan Yusoff bin Tuan Mohamed [1974] 1 MLJ 58
Gan Hay Chong v. Siow Kian Yuh & Anor. [1975] 2 MLJ 129
Abdul Majeed v. Yeo Chng Tay [1964] 30 MLJ 75

Legislation referred to:

Married Women Ordinance 1957, s. 9(2)

For the respondent - Zainur Zakaria; M/s. Zainur & Maydien
For the applicant - S. Kanagasabapathi; M/s. R.K. Nathan & Co.

JUDGMENT

Wan Yahya Pawan Teh J:

The sequence of events which led to the present application for an extension of time to file and serve a notice of appeal can be shortly summarised as follows.

2.9.1989 At the appointed date for the delivery of judgment on Sessions Court Case No. P83/83, Counsel for the respondent herein was represented by his pupil whom at the applicant's clerk's request also agreed to mention on behalf of the applicant's Counsel.

The pupil recorded the oral judgment given by the Sessions Court Judge and supplied a handwritten copy of that judgment to the applicant's clerk who then conveyed the judgment to the applicant's Counsel.

19.9.89 The applicant forwarded a draft judgment of what he believed to be the correct version of the oral judgment based on the notice made by the respondent's pupil.

13.10.89 The respondent acknowledged receipt of the draft under cover of the applicant's letter dated 19 September 1989 and returned the draft judgment which they had amended.

10.11.89 Due to the controversial views taken by the parties as to the correct terms of the verbal judgment, the applicant wrote to Registrar of the Sessions Court seeking for an appointment for the Sessions Judge to settle the order. The Sessions Judge fixed the date for the meeting to take place on 11 December 1989.

11.12.89 The learned Sessions Judge for unavoidable reason adjourned the meeting to 29 December 1989.

20.12.89 In the meantime the respondent by letter took the stand that the Sessions Court Judge was *functus officio* and therefore they would not attend the meeting fixed by the Sessions Court Judge.

29.12.89 Consequently only the applicant attended the meeting on this date during which the Sessions Court Judge settled the order in respondent's favour.

The applicant contends that there are merits for Sessions Court case P83/83 to go on appeal on an important point of law involving s. 9(2) of the Married Women Ordinance 1957. This ground has not been argued during the hearing of the application and I take it that the respondent is not disputing that there is a serious and important question of law to be raised in the appeal.

At the hearing before me, the respondent's only objection appears to be based on the circumstances on which special leave should be given. The respondent contends that leave should be refused as the main issue arising out of the application had originated from applicant's Counsel's mistake in misappreciating the Sessions Court Judge's judgment. Counsel cited *Chong Kueng Ying & Other v. Louis Lavagna* [1972] 1 MLJ 180; *Chin Hua Sawmill Co. Sdn. Bhd. v. Tuan Yusoff bin Tuan Mohamed* [1974] 1 MLJ 58 and *Gan Hay Chong v. Siow Kian Yuh & Anor.* [1975] 2 MLJ 129. The first mentioned case as I understand it, was founded on the applicant's Counsel mistake of law, the second relates to the applicant's Counsel's unfavourable state of mind and the third case, like the first one was attributed to Counsel's mistake of law for not filing the appeal in time. The applicant in our present case is not relying on any of these grounds but on special circumstances.

In *Abdul Majeed v. Yeo Chng Tay* [1964] 30 MLJ 75, Thompson LP held that the term 'special leave' in an application for extension of time to file a notice of appeal means leave to be granted on account of special circumstances. Such circumstances, to mind, had arisen in our present application in the following sequence of events: Firstly it arose on the very date of the Lower Court's judgment itself i.e. on 2 September 1989 through the indirect and informal communication between the respondent's pupil and the applicant's Counsel. Although the conduct of the pupil in the case is appreciated, his indirect communication could have given rise to the applicant's misappreciation of the terms of the judgment. The second unfortunate circumstance came about as a result of the events which transpired on 19 September 1989 - where the applicant forwarded the draft judgment outlining the terms which they thought was the essence of the judgment delivered by the Sessions Court Judge. It is unfortunate that although the applicant's draft was sent on 19 September 1989, the respondent's reply only came on 13 September 1989. Had the respondent immediately on discovery of the inconsistent term of the judgment, drawn the applicant's attention to the inconsistencies, the applicant would have been given the opportunity to file his notice of appeal. Such information could have been conveyed by phone. But as it was, the respondent's written reply was only conveyed to the applicant on 13 October 1989 that is about 3 weeks after receiving the draft order from the applicant by which time the last day for filing the notice had elapsed.

The third circumstance affecting the present application is the respondent's attitude in initially agreeing and subsequently withdrawing his consent to settle the order. The initial agreement must have led the applicant into believing that the respondent would not have objected to an extension of time when the order was settled by the Sessions Court Judge. The fourth circumstance arose on 11 December 1989 when the Sessions Court Judge who was unavailable on that date adjourned the hearing to 20 December 1989.

From the above facts, I find that the applicant had shown sufficient reasons to make out the special circumstances required to support an application of this nature and as the appeal involves an important question of law I allowed this appeal but ordered the applicant to pay the cost of the application.

Also found at [1991] 1 CLJ 147